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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206-AM40

Access to Federal Employees Health Benefits (FEHB) for Employees of Certain Indian Tribal Employers

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a Notice of Proposed Rulemaking to address the implementation of certain provisions of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended (ACA) making Federal employee health insurance accessible to employees of certain Indian tribal entities. The ACA includes authorization for Indian tribes, tribal organizations, and urban Indian organizations that carry out certain programs to purchase coverage, rights, and benefits under the Federal Employees Health Benefits (FEHB) Program for their employees. Tribal employers and tribal employees will be responsible for the full cost of benefits, plus an administrative fee.

DATES: *Comment date:* Comments are due on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger, Senior Policy Analyst (202) 606-0004.

ADDRESSES: You may submit comments, identified by RIN number "3206-AM40 " using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Chelsea Ruediger, Senior Policy Analyst, Planning and Policy Analysis, U.S. Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Office of Personnel Management (OPM) is issuing a notice of proposed rulemaking to extend certain Federal employee benefits to employees of certain Indian tribal employers. The Patient Protection and Affordable Care Act (Pub. L. 111–148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), as amended (ACA) extended eligibility to purchase coverage, rights, and benefits under the Federal Employees Health Benefits (FEHB) Program to employees of those Indian tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), and urban Indian organizations carrying out programs under title V of the Indian Health Care Improvement Act (IHCIA). This regulation includes program rules for tribal employers and tribal employees in accordance with chapter 89 of title 5, United States Code. The new regulatory provisions are set forth in new subpart N, part 890 of title 5 of the Code of Federal Regulations.

These proposed rules, which codify previously issued guidance, adopt the FEHB program for Federal employees under 5 USC section 89 with slight variations to meet the needs of the tribal population. OPM performed consultation and developed sub-regulatory guidance in 2011-2012 to administer the program. OPM has been operating the program since then and tribal employers began purchasing FEHB for their employees on March 22, 2012 with an insurance coverage effective date of May 1, 2012. As of the publication date of this proposed rule, 19,540 tribal employees and 90 tribes are participating in the program. These proposed rules codify the program as set forth in previous guidance after extensive work understanding tribal population needs.

Authorizing Legislation

Section 10221 of the ACA enacted the entire text of S. 1790 as reported on December 16, 2009 by the Senate Committee on Indian Affairs to Public Law 111-148. S. 1790 revised and extended the IHCIA, including adding a new section 409 to the IHCIA (codified at 25 U.S.C. 1647b).

This proposed regulation refers to tribes, tribal organizations, and urban Indian organizations that are entitled to access insurance under section 409 as “tribal employers.” Moreover, because the term “employee” as used in 5 U.S.C. chapter 89 is a statutorily defined term, OPM refers to a tribal employer's employees who are eligible to enroll in FEHB as “tribal employees.”¹ This proposed regulation establishes how FEHB

¹ The ACA establishes entitlement for certain tribal employers to purchase FEHB coverage, rights, and benefits for their tribal employees in a manner consistent with the FEHB statute 5 U.S.C. Ch. 89. The Department of Labor reviewed this notice of proposed rulemaking and advised that the tribal employer does not “establish or maintain” an employee welfare benefit subject to Title I of ERISA with such a purchase pursuant to the ACA, and advised that the enrollment of tribal employees in FEHB coverage does not affect the status of the FEHB as a governmental plan

enrollment will be administered, including eligibility, tribal employer and tribal employee contribution to premiums, the process by which tribal employers will access these programs, the programs, the process by which tribal employees will elect coverage, and circumstances for termination and cancellation of enrollment.

Where practicable, this regulation provides for the administration of benefits by and for tribal employers and tribal employees in the same manner as these benefits are administered by and for Federal agencies and Federal employees. There may be some instances for which there is no established procedure in place for the Federal Government, such as the procedure and timeline by which tribal employers certify entitlement to purchase FEHB. When there are no established procedures in place, OPM has proposed a procedure.

OPM has worked in consultation with tribal leaders to establish program rules.

Tribal consultation

Under Executive Order 13175, OPM has an obligation to engage in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” OPM is committed to fulfilling this obligation.

for purposes of the exemption from title I of ERISA at 29 U.S.C. 1003(b)(1). In addition, the Department of the Treasury, including the Internal Revenue Service, reviewed this notice of proposed rulemaking and advised that the enrollment of tribal employees in FEHB coverage does not affect the status of the FEHB as a governmental plan within the meaning of 26 U.S.C. 9832(d)(2).

Following the passage of the ACA, OPM published a series of policy papers (found here under Outreach Documentation) regarding the implementation of the Tribal FEHB Program. Tribes, tribal organizations, and urban Indian organizations were given an opportunity to provide feedback on these papers at outreach events and tribal conferences and meetings. Written feedback was also accepted.

A Tribal Technical Workgroup composed of tribal human resource representatives and OPM operational and policy staff was established when developing this regulation and in support of the implementation of the Tribal FEHB Program. The primary purpose was to ensure system requirements for enrollment processing were completed according to the needs of tribal employers.

Additional tribal consultative actions included collaborating with the Department of Health and Human Services (HHS) to conduct in-person briefings for tribal communities across the country, focusing on the implementation of the ACA.

OPM representatives have attended more than 20 tribal conferences and meetings to provide information and consultation about the Tribal FEHB Program since its inception. In addition, OPM has hosted training sessions for interested tribes and tribal organizations on numerous occasions. Tribal Benefits Administration Letters (TBAL) are released and distributed to participating tribal employers regularly, just as they are for Federal agencies. Questions following the release of a TBAL are directed to OPM's dedicated Tribal Desk. The Tribal Desk is available during regular business hours and is

answered by the OPM staff who administer the program. Whenever possible, OPM has created direct lines of communication and fostered collaboration between tribal employers and OPM employees.

When important program changes occur, OPM issues Dear Tribal Leader Letters (DTLL) to notify tribes, tribal organizations and urban Indian organizations. An example was the DTLL issued describing the revision of the original “all-or-nothing” policy. The original policy had required a tribal employer to enroll all of their billing units. Due to concerns raised by tribal employers, OPM amended that policy to allow tribal employers to select which of their billing units will receive FEHB and which will not. As a result, interest in FEHB enrollment has increased.

OPM’s obligation to consult with tribal officials is ongoing. OPM will consider the public comment period of this proposed rule as an important consultation period. Tribal leaders will be alerted of the publication of this proposed rule and the process for submitting formal comments with a DTLL. As appropriate, OPM will conduct meetings with tribal officials to address components of this proposed rule. A DTLL will also be issued in tandem with the publication of a final rule.

FEHB Background

The FEHB Program was established in 1960 to provide health benefits to Federal employees, annuitants, spouses, and children. Approximately 8.2 million employees, annuitants, and family members are now covered. Federal employees can choose among various forms of

health plans, including nationwide Fee-for-Service (FFS) plans, local Health Maintenance Organizations (HMO), Consumer-Driven Health Plans (CDHP), and High-Deductible Health Plans (HDHP). FEHB plans typically cover inpatient and outpatient hospital care, primary care and specialist doctor visits, and pharmacy benefits. Some FEHB plans offer limited routine vision and dental benefits.

Currently, there are three FEHB enrollment categories: (1) self only; (2) self plus one; and (3) self and family. A self only enrollment covers only the enrollee. A self plus one enrollment covers the enrollee and one designated eligible family member. A self and family enrollment covers the enrollee and all eligible family members. Eligible family members include a spouse and/or child(ren) under age 26 (including married children, adopted children, and stepchildren). A child age 26 or over who is incapable of self-support because of a mental or physical disability that existed before age 26 is also an eligible family member. A foster child may be covered if the child lives with the employee in a parent-child relationship and the employee expects to raise the child to adulthood.

A newly eligible Federal employee can enroll in any FEHB plan available in his or her geographic region within 60 days of becoming eligible. FEHB coverage is effective the first day of the pay period after the enrollment request is received by the Federal employee's employing office and that follows a pay period during any part of which the employee is in pay status. Federal employees can enroll, cancel enrollment, increase or decrease enrollment, or change plans or options during the annual open

season usually held from mid-November to mid-December. Any changes made during open season are effective for the following calendar year. Enrollees can also change enrollment in conjunction with a qualifying life event (QLE), such as marriage, divorce, birth or adoption of a child, change in employment status that affects insurance coverage or cost, or a move outside of an HMO's service area.

The employing Federal agency pays a Government contribution of approximately 72 percent of the weighted average of premiums in effect for each calendar year. The Government contribution to any individual plan is capped at 75 percent of premium. FEHB plans generally require enrollee cost sharing in the form of calendar year deductibles, copayments, and/or coinsurance for covered services.

Definitions

Section 890.1402 defines several terms used in the new subpart N of Part 890. This section also includes a series of deemed references. Defining these terms and identifying deemed references are necessary to make clear how OPM will modify and apply existing regulations to govern tribal employers' purchase of FEHB for tribal employees.

The new subpart N refers to and incorporates many other subparts of part 890 that govern how the FEHB Program functions. The deemed references make it clear that references to statutory terms such as "employee," and other terms used throughout part 890 will be deemed references to "tribal employee," and other terms as appropriate, in context, to govern tribal employers' purchase of FEHB for its tribal employees pursuant to the ACA.

Scope of Entitlement for Tribal Employers

Entitlement to offer FEHB coverage, rights, and benefits will be available to any tribe, tribal organization, or urban Indian organization carrying out at least one of the programs under the ISDEAA or Title V of the IHCA as specified in section 409 of the IHCA. The terms “tribe,” “tribal organization,” and “urban Indian organization” are defined in the IHCA. Those definitions, set forth below, are incorporated by reference in the regulatory text at § 890.1402 which defines the term “tribal employer.” The term “tribal employer” is used to refer to any of these entities that fulfill the requirements to be entitled to purchase FEHB for its employees.

A **tribe** is any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. 1603(14).

A **tribal organization** is the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: that in any case in which a contract

is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant. 25 U.S.C. 1603(26), incorporating by reference 25 U.S.C. 450b(l) (definition of “tribal organization”).

An **urban Indian organization** is a non-profit corporate body situated in an urban center, governed by an urban Indian controlled board of directors, and providing for the maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purpose of performing the activities described in section 1653(a) of this title. 25 U.S.C. 1603(29).

For purposes of this regulation, tribes and tribal organizations carrying out at least one program under the ISDEAA, and urban Indian organizations carrying out at least one program under Title V of the IHCA, are entitled to purchase FEHB for their employees. If the tribal employer ceases to carry out one of these programs, entitlement to purchase FEHB ceases at the end of the calendar year in which the tribal employer ceased to carry out one of those programs.

If OPM determines that a tribal employer is not entitled to purchase FEHB, the tribal employer may appeal that decision to OPM. OPM retains sole authority for deciding entitlement.

Eligible Tribal Employees

OPM has defined the term “tribal employee” in § 890.1402 broadly to mean a common law employee of a tribal employer. This section incorporates the regulatory standard under the Federal employment tax regulations, (which, for this purpose, includes Federal Insurance Contributions Act tax and Federal income tax withholding), which generally provides that an individual is a common law employee if the tribal employer has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. This determination is based on all the facts and circumstances. The section then indicates that this determination is to be guided by a list of 20 factors² developed by the Internal Revenue Service (IRS), or any future guidance the IRS releases related to the common law employee relationship for Federal employment tax purposes. Because OPM expects tribal employers to treat tribal employees consistently for purposes of Federal employment taxation and access to Federal insurance, the tribal employer’s determination of common law employee status for purposes of eligibility for FEHB must be consistent with any determination of common law employee status made by the tribal employer for Federal employment tax purposes.

OPM recognizes that there may be cases in which a tribal employer has determined that a worker is not a common law employee for purposes of establishing a Federal employment tax obligation, and the tribal employer meets all the requirements

²IRS in Rev. Rul. 87-41, 1987-1 C.B. 296 and referenced in Joint Committee on Taxation report JCX-26-07 “*Present Law and Background Relating to Worker Classification for Federal Tax Purposes*,” dated May 7, 2007 <http://www.irs.gov/pub/irs-utl/x-26-07.pdf>

for relief from Federal employment taxes under section 530 of the Revenue Act of 1978 with respect to such worker. Under these circumstances, as long as the tribal employer continues to meet the requirements for such relief, OPM will defer to the tribal employer's reasonable determination that its worker is not a common law employee for purposes of eligibility to enroll in FEHB.

OPM recognizes that there may be very limited cases in which a tribal employer has determined that a worker is a common law employee but has also determined that no Federal employment taxes are due with respect to the worker. Under these circumstances, OPM will defer to the tribal employer's reasonable determination that the worker is a common law employee for purposes of eligibility to enroll in FEHB.

Each tribal employer entitled to access Federal insurance will be able to offer FEHB coverage, rights, and benefits to all of its tribal employees, not just those carrying out functions under the ISDEAA or IHCA title V programs. OPM has determined that tribal employees (who, by definition, are common law employees) engaged in governmental or commercial operations, such as casino or hospitality operations, will be eligible to enroll in FEHB if it is purchased by their tribal employer. As discussed below, individuals who retire from employment with a tribal employer lose their status as tribal employees upon retirement and their enrollment will terminate.

A tribal employer carrying out programs under the ISDEAA or Title V of the IHCA may purchase FEHB for employees of one or more billing units carrying out programs or activities

under their contract. Once a tribal employer has enrolled at least one billing unit carrying out programs or activities under ISDEAA or IHCIA, the tribal employer may enroll one or more billing units that are not carrying out programs or activities under ISDEAA or IHCIA. Section 890.1405 establishes that all eligible full-time and part-time tribal employees of each participating billing unit of a tribal employer must be offered the opportunity to enroll in FEHB. Intermittent, seasonal, and temporary tribal employees will be treated similarly to intermittent, seasonal and temporary Federal employees. However, under § 890.102(k), the tribal employer may choose not to extend coverage to certain intermittent, seasonal, and temporary employees if written notification is provided to the Director of OPM.

Tribal employers may not segment tribal employee populations by offering a different set of health benefits to different groups of tribal employees within a single billing unit. An exception to this rule is if tribal employees within a billing unit are offered alternative coverage as part of a collective bargaining agreement.

Coverage of Family Members

As described in § 890.1405(e), family members of tribal employees will be eligible for coverage in FEHB under substantially the same terms as family members of Federal employees. One exception is that former spouses of tribal employees may not enroll in FEHB under the Civil Service Retirement Spouse Equity Act. This is because Spouse Equity coverage is linked to the former spouse's entitlement to a portion of a Federal employee's annuity. Another exception is that if the tribal employee dies while

employed, a surviving spouse cannot continue FEHB enrollment or enroll in his or her own right, unless the surviving spouse is also FEHB-eligible through his or her employment. This is because continuing FEHB eligibility for surviving spouses of Federal employees is linked to a survivor annuity.

Section 890.1406 states that correction of enrollment errors will take place according to the same terms as for Federal employees. Requirements for tribal employees' appeals of eligibility and enrollment decisions are described in § 890.1415.

Tribal Employer and Tribal Employee Contributions and Administrative Fee

Section 890.1403 explains that a tribal employer is entitled to purchase FEHB if payment, defined by § 890.1402 as all premiums plus administrative fees, are currently deposited in the Employees Health Benefits Fund, as required by the authorizing statute. This section provides that a payment will be considered “currently deposited” if it is received by the Fund before, during, or within fourteen days after the end of the calendar month covered by the payment.

Section 890.1413 describes how payment will work for tribal employers participating in FEHB. Tribal employer and tribal employee contributions for FEHB will be handled similarly for tribal employees as for Federal employees, with the tribal employer responsible for contributing a share of premium that is at least equivalent to the share of premium that the Federal Government contributes for Federal employees. The percentage contribution requirements are described in 5 U.S.C. 8906. The FEHB contributions for part-time tribal

employees working between 16 and 32 hours per week may be pro-rated in accordance with the terms applicable to part-time Federal employees. FEHB enrollment for tribal employees on unpaid leave may be continued in a manner similar to Federal employees on unpaid leave under 5 CFR 890.502(b), as long as the full premium is paid.

The tribal employer's FEHB contribution percentage must equal or exceed the contribution that the Federal Government would make each month for a Federal employee for the same plan. Tribal employers may elect to pay a greater tribal employer contribution, but may not pay a lesser amount than the Federal Government contribution for each plan. There is no cap on the percentage of premium that a tribal employer may contribute. The tribal employer may vary the contribution by type of enrollment (self only, self plus one, self and family) but must treat tribal employees in a uniform manner. As an example, a tribal employer could contribute 100% for all tribal employees in self only or self plus one enrollments and 90% for all tribal employees in self and family enrollments. Tribal employers may not vary the tribal employer contribution in order to encourage or discourage enrollment in any particular plan or plan option. Tribal employers may choose to vary the contribution amounts for each billing unit, provided each billing unit meets the requirements set forth above.

In addition, the tribal employer is required to pay an administrative fee, in an amount set by OPM each year, for each tribal employee's enrollment on a monthly basis. This fee covers the costs of a paymaster to perform the collection and remittance functions that is performed for Federal employees by Federal payroll offices. The

paymaster is the entity designated by OPM as responsible for receiving FEHB premiums from the tribal employer, forwarding premiums to the Employees Health Benefits Fund, and maintaining enrollment records for all participating tribal employers. Tribal employers may not charge this fee to tribal employees. The total aggregate amount for tribal employees' and tribal employer's share of the premium and the administrative fee must be available for receipt by the paymaster on an agreed upon date set in the agreement with the tribal employer.

Tribal Employers' Entitlement and Election to Purchase FEHB

Section 890.1404 establishes a process by which tribal employers may demonstrate entitlement and elect to purchase, FEHB for their tribal employees. The tribal employer must notify OPM by email or telephone of the intention to purchase FEHB. Through an agreement described in § 890.1404(b), OPM will confirm: (1) the tribal employer's contact information; (2) the date that FEHB coverage will begin; (3) the approximate number of tribal employees eligible to enroll; (4) the tribal employer's agreement not to make available to FEHB-eligible tribal employees alternate tribal employer-sponsored health insurance coverage concurrent with FEHB; (5) the tribal employer is entitled to participate in the FEHB by carrying out at least one program under ISDEAA or title V of IHCIA; (6) the tribal employer's acknowledgement that participation in FEHB makes the tribal employer subject to Federal Government audit with respect to such participation and to OPM authority to direct the administration of the program; (7) the tribal employer's agreement to establish or identify an independent dispute resolution panel to adjudicate appeals of determinations made by a tribal employer regarding an individual's status as a tribal employee; (8) the tribal employer's agreement to supply necessary enrollment information, payment of the tribal employer and tribal employee share of premium

and payment of an administrative fee to the paymaster; (9) the tribal employer's agreement to notify OPM in the event that the tribal employer is no longer carrying out at least one program under the ISDEAA or title V of IHCA, and (10) the tribal employer's agreement to abide by other terms and conditions of participation.

Section 890.1404(c) allows a tribal employer to elect to purchase FEHB at any time. The election to purchase FEHB will commit the tribal employer to purchase FEHB at least through the remainder of the calendar year in which the election is made. Elections will be automatically renewable year to year unless revoked by the tribal employer or terminated by OPM. Section 890.1404(d) allows a tribal employer to revoke its election to purchase FEHB with 60 days' notice to OPM. If a tribal employer revokes an election to purchase FEHB, that tribal employer may only re-elect to purchase FEHB during the first annual open enrollment season that occurs at least twelve months after the election is revoked. If the tribal employer revokes an election to participate a second time, the tribal employer may only re-elect to purchase FEHB during the first open season that falls at least twenty-four months after the second revocation. Section 890.1404(f) states that OPM maintains final authority to determine entitlement of a tribal employer to purchase FEHB.

A tribal employer that begins to carry out a program under ISDEAA or Title V of IHCA after this rule is effective may notify OPM of its intention to purchase benefits after the entitlement is established. Section 890.1407 states that a tribal employer electing to purchase FEHB for its employees may not concurrently make contributions

toward non-FEHB tribal employer-sponsored health insurance to any tribal employee eligible for FEHB. However, a tribal employer electing FEHB may concurrently offer non-FEHB dental, vision, or disability coverage. This requirement will keep tribal employees' enrollment conditions aligned with those of Federal employees.

Interaction with Other FEHB Coverage

Section 890.1405(f) establishes that eligibility to enroll in FEHB does not cause any tribal employee to be identified or characterized as a Federal employee, nor does it convey any additional rights or privileges of Federal employment. There may be circumstances in which a tribal employee is also an FEHB-eligible Federal employee. In such a case, the tribal employee may participate in FEHB through either employer. A tribal employee who is also a Federal employee cannot enroll in FEHB through both employers. FEHB enrollments may be transferred between Federal employing offices and tribal employers in a similar manner as transfer of enrollments between Federal agencies.

Initial Tribal Employee Enrollment Period, Open Season, and QLEs

Section 890.1405 describes tribal employee eligibility for enrollment in FEHB. Tribal employees will be able to enroll in FEHB after an agreement between the tribal employer and OPM is signed. The effective date of coverage will be decided by the tribal employer and OPM. A third party paymaster will handle payroll functions including remitting tribal employer and tribal employee contributions to FEHB premiums.

The enrollment process for tribal employees into FEHB is described in § 890.1407. Tribal employers must establish an initial enrollment opportunity for tribal employees. After that initial enrollment opportunity, for plan years during which a tribal employer's election to offer FEHB is in place, the FEHB enrollment period for tribal employees will be the same as for Federal employees: up to 60 days after becoming a new tribal employee or changing to an eligible position, during the annual open season, or 31 days before to 60 days after experiencing a qualifying life event. The effective date of enrollment for tribal employees will be the same as for Federal employees under parts 890 or 892, depending on premium conversion status. Upon enrollment in the FEHB Program, tribal employees will choose among the same nationwide and local FEHB plans that are available to Federal employees.

Section 890.1408 describes the circumstances under which a tribal employee may change enrollment type, plan, or option. These changes are allowed and will take effect under the same circumstances as for Federal employees. Changes may be restricted if the tribal employer has a premium conversion plan in effect (pre-tax treatment of premiums) and the tribal employee has elected premium conversion.

Cancellation of Coverage, Decreases in Enrollment

Section 890.1409 establishes that a tribal employee may cancel his or her FEHB coverage or decrease his or her enrollment only under the same circumstances as a Federal employee. If the tribal employee has elected premium conversion, this cancellation or change is restricted.

Termination of Enrollment

Section 890.1410 establishes that FEHB enrollment will terminate when employment with the tribal employer ends due to resignation, dismissal, or retirement, or when the tribal employer discontinues its purchase of FEHB. Termination of enrollment does not refer to a voluntary cancellation by the tribal employee during a period of continued employment. Upon termination of enrollment, the tribal employee will receive a 31-day temporary extension of coverage without premium contribution from the tribal employee or tribal employer and will have an opportunity to convert to an individual policy. Tribal employees whose FEHB enrollment terminates due to separation from tribal employment (unless the separation is for gross misconduct) are also eligible for temporary continuation of FEHB coverage (TCC), described at 5 U.S.C. 8905a and 5 CFR part 890 subpart K.

If an FEHB enrollment is terminated due to the death of the tribal employee, the tribal employee's spouse and covered children are entitled to a 31-day temporary extension of coverage and opportunity to convert to an individual policy. Covered children, if any, may elect TCC and may cover the tribal employee's surviving spouse as a member of family.

Termination Due to Non-Payment of Premiums

Section 890.1410(f) establishes that insufficient payment from the tribal employer to the paymaster can result in termination of enrollment for all of the tribal employer's tribal employees affected by the paymaster's failure to obtain current deposit. In such a case, FEHB enrollment for all affected tribal employees will be terminated according to a process determined by OPM.

FEHB enrollment of all tribal employees affected by the paymaster's failure to obtain current deposit will be terminated effective as of midnight on the last day of the month in which premium payment was received. These tribal employees will be entitled to a 31-day temporary extension of coverage without additional premium contribution and the opportunity to convert to an individual policy. In the event that a tribal employer elects to purchase FEHB and does not pay premiums for the first month in which payment is due, no 31-day temporary extension of coverage or opportunity to convert to an individual policy will be provided. Termination of enrollment due to non-payment of premiums in either case will not result in an opportunity to enroll in TCC since current tribal employees do not meet the conditions for TCC enrollment. Tribal employers will have full responsibility for communicating notice of termination of enrollment, and accompanying rights and obligations, to their tribal employees. Any outstanding premium due for coverage in arrears will be treated as a debt owed solely by the tribal employer.

Temporary Continuation of Coverage (TCC)

Tribal employees and certain family members whose FEHB coverage terminates under certain circumstances can elect to purchase temporary continuation of coverage (TCC) for up to 18 or 36 months. Section 890.1411 establishes the criteria for TCC participation for tribal employees and their family members. In general, tribal employees who are enrolled in FEHB and separate from tribal employment, except for reasons of gross misconduct, may elect to purchase TCC. Certain formerly covered family members, including children or stepchildren who no longer meet the requirements of a covered family member, and former spouses, may elect TCC. The surviving spouse of a

deceased enrollee who was enrolled in FEHB is not eligible to elect TCC, but may be covered by the TCC enrollment of an eligible child.

The administrative fee is the same as would apply to a former Federal employee enrolled in TCC. The administrative fee described in § 890.1413(e) would not apply to a TCC enrollment of a tribal employee or family member.

Non-pay Status, Insufficient Pay, or Change to Ineligible Position

Section 890.1412 establishes that a tribal employee in non-pay status or with insufficient pay to cover the premium costs may continue FEHB enrollment for up to 365 days. Tribal employees in non-pay status due to uniformed service are entitled to continue FEHB enrollment for up to 24 months. After termination, the tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution, and conversion to an individual policy.

Section 890.1412 also establishes that a temporary tribal employee who has insufficient pay to cover the employee share of FEHB premiums may choose a less expensive plan. If the tribal employee does not or cannot move to a less expensive plan, the FEHB enrollment will be terminated and the enrollee is entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy.

If a tribal employee moves from an FEHB-eligible to a FEHB ineligible position, the FEHB enrollment can continue if there has not been a break in service of more than three days. If there has been a break in service of longer than three days, FEHB enrollment will terminate at

midnight of the last day of the pay period in which the employment status changed. Such a tribal employee will be entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy.

Responsibilities of the Tribal Employer

Section 890.1414 describes the responsibilities of the tribal employer. These include premium payment, eligibility determinations, enrollment, establishment of appeals process, communications regarding FEHB, and notification requirements.

Eligibility and Enrollment Decisions and Appeal Rights

Section 890.1415 requires that a tribal employer establish or identify an independent panel to resolve disputes about eligibility of individuals for FEHB enrollment. This panel must be authorized to adjudicate such disputes and enforce eligibility and enrollment determinations. The tribal employer must inform tribal employees of this avenue for dispute resolution. Decisions of the independent panel must be written, a record of evidence considered by the panel must be retained and available for OPM review, and the panel decisions remain subject to final OPM authority.

Filing Claims for Payment or Service; Court Review of Disputed Claims

Section 890.1416 describes the procedures for (1) filing claims for payment or service; and (2) invoking the provisions for court review of disputed claims. Both situations will follow the established procedures for Federal employees.

No Continuation of FEHB Enrollment into Retirement from Employment with a Tribal Employer

Section 890.1417 states that an FEHB enrollment cannot be continued into retirement from employment with a tribal employer. This is a statutory requirement as the law entitles tribal employers to purchase FEHB for employees but it does not extend that entitlement to permit tribal employers to purchase FEHB for retirees.

A Federal annuitant may continue FEHB into retirement and any enrollment in, or coverage as a family member under FEHB during employment with a tribal employer will count toward the “five-year rule.” The “five-year rule” generally requires five years of pre-retirement FEHB enrollment, or coverage as a family member, in order to continue FEHB into retirement. Section 890.1417 further states that a Federal annuitant who has continued FEHB into retirement and who begins post-retirement employment with a tribal employer that has elected to purchase FEHB may transfer the FEHB enrollment with his or her Federal retirement system to an enrollment with the tribal employer in a similar manner as that used for Federal annuitants re-employed by Federal agencies.

No Continuation of FEHB Enrollment for Compensationers Past 365 days

Section 890.1418 establishes that tribal employees who are not also Federal employees, but are receiving worker’s compensation benefits in leave without pay status for more than 365 days under programs run by the U.S. Department of Labor may not be enrolled in FEHB.

Regulatory Impact Analysis

OPM has examined the impact of this proposed rule as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity), and based on that analysis, it has determined that it is an economically significant rule. A regulatory impact analysis must be prepared for economically significant rules.

Need for Regulatory Action

As part of the ACA, section 10221 incorporated and enacted S. 1790, the Indian Health Care Improvement Reauthorization and Extension Act of 2009, resulting in the addition of section 409 to the IHCA. Section 409 allows tribes, tribal organizations and urban Indian organizations carrying out specific programs under Federal law to purchase the rights and benefits FEHB Program for their employees. As the administrator of the FEHB, OPM has extended eligibility to entitled tribal employees within the meaning of section 409. Section 409 has been implemented and over 16,000 tribal employees are currently covered by FEHB. Federal regulations are necessary to protect the interests of all stakeholders, memorialize processes and procedures, and provide transparency.

Regulatory Baseline

The costs, benefits and transfers assessed in remaining portions of this regulatory impact analysis reflect existing FEHB coverage of tribal employees. This analysis is consistent with the guidance provided in OMB Circular A-4.

Benefits of Coverage

Health insurance coverage improves access to health care services, including preventive services, improves clinical outcomes, financial security, and decreases uncompensated care.³ Although section 409 extends FEHB to employees of tribes, tribal organizations, and urban Indian organizations regardless of their status as tribal members, the authorizing legislation for this regulation falls under 25 U.S.C. Chapter 18 which clearly outlines congressional intent to “maintain and improve the health of the Indians” and identifies providing “the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States” as a major national goal of the United States (section 1601). Thus, the following section discusses the benefits of extending health insurance to tribal members, rather than to tribal employees in general.

While the exact benefits of health insurance are difficult to quantify, evidence supports that American Indians and Alaska Natives could benefit more from health insurance than the average population. According to a 2013 Kaiser Family Foundation report, American Indians and Alaska Natives were more likely than other nonelderly adult Americans to report being in fair or poor health, being overweight or obese, having diabetes and cardiovascular disease, and experiencing frequent mental distress.⁴ They had limited access to employer-sponsored coverage

³ See Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, Exchange Standards for Employers (CMS-9989-FWP) and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (CMS-9975-F) for a more detailed description of the benefits of health insurance.

⁴ Kaiser Family Foundation, “Health Coverage and Care for American Indians and Alaska Natives”, October 2013.

because more were unemployed or in low-wage jobs that did not offer health benefits. Almost a third of them were uninsured. More than 90% had incomes below 400% and 60% had incomes below 138% of the Federal poverty level. The infant mortality rate was 150 percent higher for Native American infants than white infants, and the suicide rate for Native Americans was two and a half times the national rate.⁵

The Indian Health Service (IHS), which provides services through a network of hospitals, clinics, and health stations to about 2.2 million American Indians and Alaska Natives, has historically been underfunded. Access to services varies significantly by location and funds are insufficient to meet health care needs. According to the Federal Disparity Index, in 2010 the IHS funds covered less than 60% of those needed to pay for coverage equivalent to that of Federal employees.⁶

Health services not available through direct care must be purchased through the Purchased/Referred Care (PRC) (formerly Contract Health Services)⁷ program. Some

⁵ Then Senator Barack Obama, Indian Health Care Improvement Act Amendments of 2007 Floor Speech, U.S. Senate, January 2008.

⁶ The Federal Employees Health Plan Disparity Index (hereinafter “FDI”) is an index comparing Indian Health Service (IHS) funding to the cost of providing medical insurance for American Indian/Alaska Native (AI/AN) users in a mainstream health insurance plan such as that offered under the Federal Employees Health Benefits Program (FEHBP). The FDI uses actuarial methods that control for age, sex, and health status to price health benefits for Indian people using the FEHBP, which is then used to make per capita health expenditure comparisons. See http://www.nihb.org/docs/07112013/FY%202015%20IHS%20budget%20full%20report_FINAL.pdf for 2010 information.

⁷ This program was renamed in The Consolidated Appropriations Act of 2014 to the Purchased/Referred Care program. Discussion in this regulatory impact analysis provides pre-statutory examples covering 1992-2008 and cites the 2009 budget request. Although there is currently still major unmet need, funding for this program has increased from \$579 million in FY 2008 to \$914 million in FY 2016. See the FY17 Congressional Budget Justification at

estimates indicate that the PRC program has lost at least \$778 million due to unfunded medical inflation and population growth between 1992 and 2008.⁸ This has resulted in allocating of health care services using the PRC medical priority system, in which many patients cannot receive care unless they are in a priority status. In FY 2007, this under-funding resulted in a backlog of over 300,000 health services that were not provided because there was not enough funding. Unfortunately, the denied/deferred services report understates the need of PRC resources due to data limitations and the fact that many tribes no longer report deferred or denied services because of the expense involved in tracking.

The sources referenced above illustrate the health disparities specific to the Native American population. Expanding healthcare access to this group not only addresses this disparity and generates benefits to the individual, but also generates societal benefits in the form of decreased healthcare costs for chronic illnesses, increased employee productivity, and a healthier population that are the result of expanding access to healthcare to any group.

Costs of Coverage

In the following section, costs associated with this rule are analyzed for the following groups: tribal employers, tribal employees, the Tribal Insurance Processing System (TIPS) (the system used by the current paymaster), OPM, and FEHB carriers. Most of the costs described below either result in a direct benefit to the individual or are transfers from one group to another.

<https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf> for more up to date information.

⁸ “The FY 2009 IHS Budget: Analysis and Recommendations,” p. 22, March 17, 2008, available at: www.npaih.org.

For example, costs incurred by tribal employees (premiums, deductibles, copays, etc.) result in individual benefits in the form of improved health outcomes. Costs incurred by tribal employers to cover premiums are a benefit to tribal employees. OPM has determined that the total dollar amounts do meet the threshold for this to be considered an economically significant rule.

OPM analyzed actual fiscal year 2015 enrollment data for the over 16,000 tribal employees enrolled in the FEHB Program and found the annual cost of enrollment to be \$168.5 million. This includes both premiums and the administrative fee added to each tribal FEHB enrollment. The administrative fee covers the costs of program administration for the paymaster⁹. A per member per month (cost per month for each covered individual) cost of approximately \$413 was calculated.¹⁰

Premiums in the FEHB Program have increased between 3-6% each year for the last five years, below increases in the commercial market. As enrollment increases, total spending on premium costs will increase. However, the administrative fee will likely decrease as administrative costs are spread among a growing number of enrollments.

Costs for Tribal Employers

⁹ This number does not include OPM's administrative costs to operate this program.

¹⁰ The number of enrollments was multiplied by a family factor to estimate total covered lives including family members. The family factor is calculated for the FEHB Program as a whole, not based on actual tribal enrollment. The total annual cost was then divided by the total number of covered lives, the result of this was divided by 12 to estimate the cost per member per month.

To cover the cost of program administration, this proposed rule includes an administrative fee assessed on a per contract basis, paid by the tribal employer¹¹. OPM has contracted with a paymaster to develop and maintain TIPS, an online portal for the input of input of enrollment data and transmission to carriers.

For fiscal year 2015, the administrative fee was \$15.15 per contract; for fiscal year 2016 it is \$12. This fee is adjusted to align with actual programmatic costs. As enrollment increases, this cost will go down as the costs of maintaining TIPS will be spread among more enrollments.

The cost of coverage for each tribal employer depends upon the number of enrollees covered, the health plans selected by those enrollees, and the portion of the premium paid by the employer.

Currently, the largest number of employees enrolled for one tribal employer is just under 4,000 and the smallest tribal employers have just one employee enrolled¹². The majority of participating tribal employers have fewer than 150 employees enrolled, with a program-wide median of 71 enrolled employees.

¹¹ This is analogous with Federal agencies who cover the cost of program administration without an additional fee to employees.

¹² Based on September 2015 enrollment.

The average cost per enrollment in the program, including the administrative fee, is estimated at approximately \$10,172.¹³

Tribal employers are required by this rule to contribute to the premium for tribal employees at least the same as the Federal government does for its employees and may contribute more, up to 100% of the premium costs. The Federal government contribution statutorily defined as the lesser of 72% of the weighted average of all premiums or 75% of the plan premium¹⁴. This averages out to approximately 70% paid by the employer, program-wide.

Based on averages for fiscal year 2015, a tribal employer may pay from just over \$7,000 to over \$40 million, depending on the number of tribal employees covered and percentage of premium contributed by the tribal employer. Of course, actual costs will vary based on plan selection.

Tribal employers assess the cost of participating and recognize that participation in the FEHB Program is a business decision made by the employers themselves. It often is a decision made by comparing the cost of other forms of health coverage and coverage through the FEHB Program. For those tribes that choose to participate it can be assumed that the benefits outweigh the costs of participation.

¹³ Total annual cost (including administrative fee) divided by number of enrollees (using September 2015 data).

¹⁴ 5 U.S.C. §8906

Costs for Tribal Employees

Costs for tribal employees depend upon the plan selected, enrollment type, and the the percentage of premium contributed by the tribal employer. Based on FY15 data, the average average cost for an annual enrollment is approximately \$10,035¹⁵ with an average annual employee contribution of approximately \$3,011. The actual tribal employee contribution varies based on the tribal employer contribution towards the premium.

Other costs such as copays, deductibles, and coinsurance are also the responsibility of the tribal employee, to the extent that such cost sharing is not otherwise prohibited by Federal law. These costs differ based on plan selection and utilization. Individual enrollment in the FEHB Program is voluntary so it can be assumed that the benefits to the individual of enrolling in tribal employer-sponsored coverage outweigh the costs of enrollment.

Administration of TIPS

Annual costs for administering TIPS, incurred by the paymaster, are described in the chart below. These costs are covered by the administrative fee paid by tribal employers.

| Dates | Costs |
|---|----------------|
| May 2012(launch date) through Sept 30, 2012 | \$1,096,932.00 |
| 2013 Fiscal year | \$1,677,293.68 |
| 2014 Fiscal year | \$1,653,397.93 |
| 2015 Fiscal year | \$1,815,660.00 |

¹⁵ Does not include the Administrative Fee, which is covered by tribal employers.

Costs for OPM

Implementation of the Tribal FEHB Program began in fiscal year 2011. In addition to policy development and tribal consultation costs, OPM contracted with a paymaster to develop an electronic enrollment portal for tribal employers. Development of the Tribal Insurance Processing System (TIPS) cost approximately \$3.9 million. OPM received approximately \$3 million in funds from the Department of Health and Human Services' (HHS) Health Insurance Reform Implementation Fund and covered the remaining costs from funds appropriated to OPM.

OPM continues to incur costs associated with managing the Tribal FEHB Program. These costs are not covered by the administrative fee included in each tribal enrollment. See the chart below for Full Time Equivalent in FY2012-FY2015.

| Fiscal Year | FTE |
|-------------|-----|
| FY2012 | 5.3 |
| FY2013 | 3.5 |
| FY2014 | 2.3 |
| FY2015 | 1.8 |

FEHB Carriers

The impact on carriers is relatively small, as tribal enrollments are a very small percentage of the over 4 million FEHB enrollments. Premiums cover claims costs, administrative costs, plus a small profit known as the service charge.

Conclusion

While this rule meets the thresholds in Executive Orders 12866 and 13563 to be deemed an economically significant rule, many of the associated costs constitute transfers among involved parties. Under the provisions of this rule, participation in the FEHB Program is voluntary for both tribal employers and tribal employees. This, in conjunction with the relationship between costs incurred and the benefits of offering coverage, indicates that the benefits of this rule outweigh the costs.

List of Subjects on 5 CFR Part 890

Administrative practice and procedure, Government Employees, Health insurance.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

For the reasons set forth in the preamble, OPM amends 5 CFR Part 890 to read as follows:

Part 890 FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for Part 890 is revised to read as follows:

AUTHORITY: 5 U.S.C. 8913; Sec. 890.303 also issued under Sec. 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; Subpart L also issued under Sec. 599C of Public Law 101-513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under Secs. 11202(f), 11232(e), 11246(b) and (c) of Public Law 105-33, 111 Stat. 251; Sec. 721 of Public Law 105-261, 112 Stat. 2061 unless otherwise noted; Sec. 890.111 also issued under Sec. 1622(b) of Public Law 104-106, 110 Stat. 515. Subpart N issued under Sec. 10221, Pub. L. No. 111-148, 124 Stat 935 [25 U.S.C. 1647b].

2. Add new subpart N to read as follows:

Subpart N— FEDERAL EMPLOYEES HEALTH BENEFITS FOR EMPLOYEES OF CERTAIN INDIAN TRIBAL EMPLOYERS

Sec.

890.1401 Purpose.

890.1402 Definitions and deemed references.

890.1403 Tribal employer purchase of FEHB requires current deposit of payment.

890.1404 Tribal employer election and agreement to purchase FEHB.

890.1405 Tribal employees eligible for enrollment.

890.1406 Correction of enrollment errors.

890.1407 Enrollment process; effective dates.

890.1408 Change in enrollment type, plan, or option.

890.1409 Cancellation of coverage or decreases in enrollment.

890.1410 Termination of enrollment and 31-day temporary extension of coverage; and conversion to individual policy.

890.1411 Temporary Continuation of Coverage (TCC).

890.1412 Non-pay status, insufficient pay, or change to ineligible position.

890.1413 Premiums and administrative fee.

890.1414 Responsibilities of the tribal employer.

890.1415 Reconsideration of enrollment and eligibility decisions and appeal rights.

890.1416 Filing claims for payment or service and court review.

890.1417 No continuation of FEHB enrollment into retirement from employment with a tribal employer.

890.1418 No continuation of FEHB enrollment in compensation status past 365 days.

Subpart N— FEDERAL EMPLOYEES HEALTH BENEFITS FOR EMPLOYEES OF CERTAIN INDIAN TRIBAL EMPLOYERS

§ 890.1401 Purpose.

This subpart sets forth the conditions for coverage, rights, and benefits under Chapter 89 of title 5, United States Code, according to the provisions of 25 U.S.C. 1647b.

§ 890.1402 Definitions and deemed references.

(a) In this subpart—

Billing unit is a subdivision of the tribal employer's workforce that aligns tribal employees for purposes of administering FEHB enrollment and collection of payment. A billing unit may be either governmental or commercial or a combination of both. So long as a tribal employer purchases FEHB for at least one billing unit that is carrying out at least one program under ISDEAA or IHCA, the tribal employer may purchase FEHB for other billing units without regard to its programs.

Pay period is the interval of time for which a paycheck is issued by the tribal employer for work performed by the tribal employee.

Paymaster is the entity designated by OPM as responsible for receiving FEHB premiums from the tribal employer, forwarding premiums to the Employees Health Benefits Fund, and maintaining enrollment records for all participating tribal employers.

Payment is the sum of the tribal employer's share of premium plus the tribal employees' share of premium plus any administrative fees or costs required under this subpart, due for the enrollment, in the aggregate, of the tribal employer's tribal employees.

Tribal employee is a full-time or part-time common law employee of a tribal employer. An individual is a common law employee if, based on all the facts and circumstances, the tribal employer has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. This determination is based on all facts and circumstances and shall be guided by the factors described by the Internal Revenue Service in Rev. Rul. 87-41, 1987-1 C.B. 296 and referenced in Joint Committee on Taxation report JCX-26-07 *Present Law and Background Relating to Worker Classification for Federal Tax Purposes*, dated May 7, 2007, and shall be consistent with the tribal employer's determination of common law employee status for Federal employment tax purposes, if any. For purposes of this subpart, tribal employees do not include retirees or annuitants of a tribal employer, volunteers of a tribal employer, or others who are not common law employees of a tribal employer. Categories of excluded tribal employees are described at §890.1405(b). FEHB benefits available to tribal employees are set

forth in this subpart and to the extent there exists any ambiguity or inconsistency between this subpart and other subparts of Part 890, the terms of this subpart will govern FEHB benefits available to tribal employees.

Tribal employer is an Indian tribe or tribal organization (as those terms are defined in 25 U.S.C. Chapter 18, “Indian Health Care”) carrying out at least one program under the Indian Self-Determination and Education Assistance Act or an urban Indian organization (as that term is defined in 25 U.S.C. Chapter 18, “Indian Health Care”) carrying out at least one program under the title V of the Indian Health Care Improvement Act, provided that the tribe, tribal organization, or urban Indian organization certifies entitlement to purchase FEHB according to the process described in subpart N. FEHB benefits that tribal employers are entitled to purchase for their tribal employees are set forth in this subpart and to the extent there exists any ambiguity or inconsistency between this subpart and other subparts of Part 890, the terms of this subpart will govern FEHB benefits available for purchase by tribal employers.

(b) In this subpart, wherever reference is made to other subparts of Part 890:

(1) A reference to employee is deemed a reference to tribal employee;

(2) A reference to employer is deemed a reference to tribal employer;

(3) A reference to enrollee is deemed a reference to a tribal employee in whose name the enrollment is carried;

(4) A reference to employing agency, employing office, or agency is deemed a reference to tribal employer, and/or if the reference involves the subject of a paymaster function, the paymaster, as appropriate;

(5) A reference to United States, Federal Government, or Government in the capacity of an employer is deemed a reference to tribal employer;

(6) A reference to Federal Service or Government Service is deemed a reference to employment with a tribal employer;

(7) A reference to annuitant, survivor annuitant, or an individual with entitlement to an annuity is deemed inapplicable in the context of this subpart; and

(8) A reference incorporated into this subpart that does not otherwise apply to tribal employees and tribal employers shall have no meaning and is deemed inapplicable in the context of this subpart.

§ 890.1403 Tribal employer purchase of FEHB requires current deposit of payment.

(a) A tribal employer shall be entitled to purchase coverage, rights, and benefits for its tribal employees under chapter 89 of title 5, United States Code, if payment for the coverage, rights, and benefits for the period of employment with such tribal employer is currently deposited in the Employees Health Benefits Fund.

- (b) Payment will be considered currently deposited if received by the Employees Health Benefits Fund before, during, or within fourteen days after the end of the month covered by the payment.
- (c) Purchase of FEHB coverage by a tribal employer confers all the rights and benefits of FEHB as set forth in subpart N to the tribal employer and tribal employee.

§ 890.1404 - Tribal employer election and agreement to purchase FEHB.

- (a) A tribal employer that intends to purchase FEHB for its tribal employees shall notify OPM by email or telephone.
 - (1) A tribal employer must purchase FEHB for at least one billing unit carrying out programs or activities under the tribal employer's ISDEAA or IHCIA contract.
 - (2) For so long as a tribal employer continues to purchase FEHB for at least one billing unit carrying out programs or activities under a tribal employer's ISDEAA or IHCIA contract, the tribal employer may purchase FEHB for one or more billing units without regard to whether they are carrying out programs or activities under the tribal employer's ISDEAA or IHCIA contract.
- (b) A tribal employer must enter into an agreement with OPM to purchase FEHB. This agreement will include:

- (1) The name, job title, and contact information of the individual responsible for health insurance coverage decisions for the tribal employer,
- (2) The date on which the tribal employer will begin to purchase FEHB coverage,
- (3) The approximate number of tribal employees who will be eligible to enroll,
- (4) A certification that the eligible tribal employees within the enrolling billing unit will not have alternate tribal employer-sponsored health insurance coverage available concurrent with FEHB,
- (5) A certification and documentation demonstrating that the tribal employer is entitled to purchase FEHB as either: an Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act; or an urban Indian organization carrying out at least one program under Title V of the Indian Health Care Improvement Act,
- (6) Agreement by the tribal employer that its purchase of FEHB makes the tribal employer responsible for administering the program in accordance with this subpart, subject to Federal Government audit with respect to such purchase and administration, and subject to OPM authority to direct the administration of the program, including but not limited to the correction of errors,
- (7) Agreement that the tribal employer will establish or identify an independent dispute resolution panel to adjudicate appeals of determinations made by a tribal employer regarding an individual's status as a tribal employee eligible to enroll in FEHB, eligibility of family members, and eligibility to change enrollment. This panel must have authority to enforce eligibility decisions,

(8) A certification that the tribal employer will supply necessary enrollment information and payment to the paymaster,

(9) Agreement to provide notice to OPM in the event that the tribal employer is no longer carrying out at least one program under the ISDEAA or title V of IHCA, and

(10) Other terms and conditions as appropriate.

(c) A tribal employer may make an initial election to purchase FEHB at any time. A tribal employer purchasing FEHB shall commit to purchase FEHB for at least the remainder of the calendar year in which the agreement is signed. Elections will be automatically renewable year to year unless revoked by the tribal employer or terminated by OPM.

(d) If a tribal employer revokes the initial election, OPM must be given 60 days notice. The tribal employer may not re-elect to purchase FEHB until the first annual open season that falls at least twelve months after the revocation. If the tribal employer revokes an election to participate a second time, the tribal employer may not re-elect to purchase FEHB until the first open season that falls at least twenty-four months after the second revocation.

(e) OPM maintains final authority, in consultation with the United States Department of the Interior and the United States Department of Health and Human Services, to determine whether a tribal employer is entitled to purchase FEHB as either:

(1) An Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act; or

- (2) An urban Indian organization carrying out at least one program under Title V of the Indian Health Care Improvement Act. If a tribe, tribal organization or urban Indian organization believes it has been improperly denied the entitlement to purchase FEHB, it may appeal the denial to OPM. The appeal will be given an independent level of review within OPM and the decision on review will be final.

§ 890.1405 Tribal employees eligible for enrollment.

(a)(1) A tribal employee who is a full-time or part-time common law employee of a tribal employer is eligible to enroll in FEHB if that tribal employer has elected to purchase FEHB coverage for the tribal employees of that tribal employer's billing unit, except that a tribal employee described in paragraph (b) of this section is not eligible to enroll in FEHB.

(2) Status as a tribal employee under § 890.1402(a) for purposes of eligibility to enroll in FEHB is initially made based on a reasonable determination by the tribal employer. OPM maintains final authority to correct errors regarding FEHB enrollment as set forth at §890.1406.

(3) Retirees, annuitants, volunteers, compensationers under Federal worker's disability programs past 365 days, and others who are not common law employees of the tribal employer are not eligible to enroll under this subpart.

(b) The following tribal employees are not eligible to enroll in FEHB:

(1) A tribal employee whose employment is limited to one year or less and who has not completed one year of continuous employment, including any break in service of 5 days or less;

- (2) A tribal employee who is expected to work less than 6 months in one year;
 - (3) An intermittent tribal employee - a non-full-time tribal employee without a prearranged regular tour of duty;
 - (4) A beneficiary or patient employee in a Government or tribal hospital or home; and
 - (5) A tribal employee paid on a piecework basis, except one whose work schedule provides for full-time service or part-time service with a regular tour of duty.
- (c) Notwithstanding paragraphs (b)(1), (2), and (3) of this section a tribal employee working on a temporary appointment, a tribal employee working on a seasonal schedule of less than 6 months in a year, or a tribal employee working on an intermittent schedule, for whom the tribal employer expects the total hours in pay status (including overtime hours) plus qualifying leave without pay hours to be at least 130 hours per calendar month, is eligible to enroll in FEHB according to terms described in §890.102(j) unless the tribal employer provides written notification to the Director as described in §890.102(k).
- (d) The tribal employer initially determines eligibility of a tribal employee to enroll in FEHB, eligibility of family members, and eligibility of tribal employee to change enrollment. The tribal employer's initial decision may be appealed pursuant to §890.1415.
- (e) A tribal employee who is eligible and enrolls in FEHB under this subpart will have the option of enrolling in any FEHB open fee-for-service plan or health maintenance organization (HMO), consumer driven health plan (CDHP), or high deductible health plan (HDHP) available to Federal employees in the same geographic location as the tribal employee. The tribal employee

will have the same choice of self only, self plus one, or self and family enrollment as is available to Federal employees.

(f) Family members of tribal employees will be covered by FEHB according to terms described at §890.302. Children of tribal employees, whether married or not married, and whether or not dependent, are covered under a self and family enrollment or a self plus one enrollment (if the child is the designated covered family member) up to the age of 26. Former spouses of tribal employees are not former spouses as described at 5 U.S.C. 8901(10) and are not eligible to elect coverage under subpart H.

(g) Eligibility for FEHB under this subpart does not identify an individual as a Federal employee for any purpose, nor does it convey any additional rights or privileges of Federal employment.

§ 890.1406 Correction of enrollment errors.

Correction of errors regarding FEHB enrollment for tribal employees takes place according to the terms described in §890.103.

§ 890.1407 Enrollment process; effective dates.

(a) *FEHB election for tribal employers.* Tribal employers may purchase FEHB coverage for their tribal employees after an agreement is accepted by OPM. Tribal employers will not be permitted to access FEHB if the tribal employer contributes toward an alternative employer-sponsored health insurance plan for tribal employees within the billing unit(s) for which the employer seeks to purchase FEHB coverage, with the exception of a collectively bargained

alternative plan. A stand-alone dental, vision, or disability plan is not considered alternative health insurance.

(b) Opportunities for tribal employees to enroll. (1) Upon electing to purchase FEHB, a tribal employer will establish an initial enrollment opportunity for tribal employees. A tribal employee's enrollment upon an initial enrollment opportunity becomes effective as prescribed by OPM.

(2) After the initial enrollment opportunity, described in §890.1407(b)(1), tribal employees are subject to the same initial enrollment period, belated enrollment rules, enrollment by proxy, and open season as Federal employees, as described at §890.301(a),(b),(c), and (f).

(3) A tribal employee who enrolls after the initial enrollment opportunity and who does not elect premium conversion through his or her tribal employer's premium conversion plan, if one is available, will be subject to the enrollment and qualifying life event rules described at §890.301 and effective dates described at §890.301(b) and (f).

(4) A tribal employee who enrolls after the initial enrollment opportunity and who elects premium conversion through his or her tribal employer's premium conversion plan, if one is available, will be subject to the enrollment rules, qualifying life event rules and effective dates described at §§892.207, 892.208 and 892.210 of this chapter (together with §890.301 as referenced therein).

§ 890.1408 Change in enrollment type, plan, or option.

(a) A tribal employee enrolled under this subpart may increase or decrease his or her enrollment, or may change enrollment from one plan or option to another, as described in §890.301 (for tribal employees who did not elect premium conversion) or Part 892 (for tribal employees who did elect premium conversion).

(b) A change in enrollment type, plan, or option under this section becomes effective as described in §890.301 (for tribal employees who did not elect premium conversion) or Part 892 (for tribal employees who did elect premium conversion).

§ 890.1409 Cancellation of coverage or decreases in enrollment.

(a) A tribal employee enrolled under this subpart may cancel enrollment as described at §890.304(d) or decrease his or her enrollment as described at §890.301. A tribal employee who does not participate in premium conversion may cancel his or her enrollment or decrease his or her enrollment at any time by request to the tribal employer, unless there is a legally binding court or administrative order requiring coverage of a child as described at §890.301(g)(3). A tribal employee who participates in premium conversion may cancel his or her enrollment as provided by §892.209 or decrease his or her enrollment as provided by §892.208 of this chapter only during open season or because of and consistent with a qualifying life event.

(b) A cancellation of enrollment becomes effective as described at §890.304(d). A decrease in enrollment becomes effective as described in §890.301(e)(2).

(c) A tribal employee who cancels his or her enrollment under this section or decreases his or her enrollment may reenroll or increase his or her enrollment only during open season or because of and consistent with a qualifying life event.

§ 890.1410 Termination of enrollment and 31-day temporary extension of coverage; and conversion to individual policy.

(a) *Tribal Employee Separation.* (1) Enrollment of a tribal employee under this subpart terminates due to separation from employment with the tribal employer for reasons of resignation, dismissal, or retirement. Termination of enrollment is effective at midnight of the last day of the pay period in which the tribal employee separates from employment.

(2) A former tribal employee who is separated under this subpart due to resignation, dismissal, or retirement and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(b) *Death of tribal employee.* (1) Enrollment of a tribal employee terminates at midnight of the last day of the pay period in which the tribal employee dies.

(2) If, at the time of death, the deceased tribal employee was enrolled in self and family FEHB coverage:

(i) The surviving spouse is entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401;

(ii) The covered children of the deceased tribal employee are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(3) If, at the time of death, the deceased tribal employee was enrolled in self plus one FEHB coverage, only the designated covered family member is entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(c) *Termination of family member coverage.* (1) Coverage of a family member of a tribal employee who was covered under this subpart terminates, subject to the 31-day temporary extension of coverage, for conversion, at midnight of the earlier of the following dates:

(i) The day on which he or she ceases to be a family member; or

(ii) The day the tribal employee's enrollment terminates, unless the family member is entitled to continued coverage under the enrollment of another.

(2) Family members who lose coverage under this subsection are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(d) *Tribal employer loses entitlement to purchase FEHB.* (1) Coverage of a tribal employee and family members under this subpart, except TCC that is already elected and in effect, terminates at midnight of the last day of the calendar year in which a tribal employer is no longer entitled to purchase FEHB. FEHB can terminate earlier at the request of the tribal employer.

(2) Following the termination described in §890.1410(d)(1), enrolled tribal employees and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(e) *Tribal employer revokes election to purchase FEHB.* If a tribal employer voluntarily revokes its election to purchase FEHB, tribal employees will be entitled to a 31-day temporary extension of coverage and may convert to an individual policy as described at §890.401. In such a case, the FEHB enrollment terminates effective the first day for which premium payment is not received and the 31-day temporary extension of coverage, for conversion begins immediately thereafter.

(f) *Failure to currently deposit payment.* (1) If payment is not currently deposited in the Employees Health Benefits Fund, the tribal employer's entitlement to purchase FEHB can be terminated, and all enrollments affected by the paymaster's failure to obtain current deposit of payment will be terminated, for non-payment.

(2) Enrollments of all of the tribal employer's tribal employees affected by the paymaster's failure to obtain current deposit of payment will be terminated effective midnight of the last day of the month for which payment was received.

(3) In the case of termination of enrollment due to non-payment, affected tribal employees will be entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401. The 31-day extension of coverage begins immediately upon termination of enrollment.

(4) In the event that a tribal employer elects to purchase FEHB for its tribal employees but does not currently deposit payment in the first month that it is due, the enrollment of tribal employees affected by the paymaster's failure to obtain current deposit of payment will be terminated effective midnight of the last day of the month for which payment was not currently deposited. Tribal employees affected by the paymaster's failure to obtain current deposit of payment will not be entitled to a 31-day temporary extension of coverage and may not convert to an individual policy as described at §890.401.

(5) Any outstanding premium due for coverage in arrears will be treated as a debt owed solely by the tribal employer.

§ 890.1411 Temporary Continuation of Coverage (TCC).

(a) For purposes of this subpart, temporary continuation of coverage (TCC) is described by 5 U.S.C. 8905a and subpart K. The administrative fee for TCC for tribal employees is the same as for Federal employees, with no specific tribal administrative fee as described in §890.1413(e).

(b) A former tribal employee who is separated under this subpart due to resignation, dismissal, or retirement may elect TCC, unless the separation is due to gross misconduct as defined in §890.1102.

(c) Eligibility for TCC for tribal employees following procedures provided in §890.1103 of subpart K, except that former spouses of tribal employees are not eligible for TCC.

§ 890.1412 Non-pay status, insufficient pay, or change to ineligible position.

(a) *Non-pay status for 365 days.* Enrollment of a tribal employee and coverage of family members may continue for up to 365 days during which the tribal employee is in a non-pay status (as described at §890.303(e)(1)) under terms described at §890.502(b). Enrollment terminates at midnight of the last day of the pay period which includes the 365th consecutive day of nonpay status or the last day of leave under the Family and Medical Leave Act, whichever is later. The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(b) *Insufficient Pay.* If the pay of a non-temporary tribal employee who is enrolled in FEHB is insufficient to pay for the tribal employee's share of premiums, the tribal employer must follow the procedure described at §890.502(b). If the enrollment is terminated due to insufficient pay, the tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(c) *Insufficient Pay for temporary tribal employees.* If the pay of a temporary tribal employee who meets eligibility requirements described at 5 U.S.C. 8906a is insufficient to pay the tribal employee's share of premiums as described at §890.304(a)(2), and the tribal employee does not or cannot elect a plan at a cost to him or her not in excess of the pay, the tribal employee's enrollment must be terminated as described at §890.304(a)(2). The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(d) *Change to ineligible position.* A tribal employee who moves from an FEHB eligible to a non-FEHB-eligible position at a tribal employer will be eligible to continue FEHB enrollment as described in §890.303(b).

(e) *Non-pay status due to Uniformed Service.* (1) Enrollment of a tribal employee and coverage of family members terminates at midnight of the earliest of the dates described at §890.304(a)(1)(vi) – (viii). The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at §890.401.

(2) Enrollment is reinstated on the date the tribal employee is restored to duty in an eligible position with the tribal employer upon return from Uniformed Service, pursuant to applicable law, provided that the tribal employer continues to purchase FEHB for its tribal employees in the affected tribal employee's billing unit on that date.

§ 890.1413 Premiums and administrative fee.

(a) Premium contributions and withholdings described at §§890.501 and 890.502 must be paid by the tribal employer and the tribal employee, except that the term OPM as used in §890.502(c) is deemed to be a reference to the paymaster, as appropriate, for purposes of this subpart. There is no Government contribution as that term is used in 5 U.S.C 8906.

(b) *Contribution requirements.* (1) A tribal employer must contribute at least the monthly equivalent of the minimum Government contribution for a specific FEHB plan as described in 5 U.S.C. 8906;

(2) There is no cap on the percentage of premium that a tribal employer may contribute, as long as the contribution and withholding arrangement is not designed to encourage or discourage enrollment in any particular plan or plan option;

(3) A tribal employer may vary the contribution amount by type of FEHB enrollment (self only, self plus one, self and family), providing it is done in a uniform manner and meets the requirements described in § 890.1413(b)(1) and (2); and

(4) A tribal employer may vary the contribution amount by billing unit, providing each billing unit meets the requirements described in § 890.1413(b)(1)-(3).

(c) A tribal employer may, but is not required to, prorate the tribal employer and tribal employee share of premium attributable to enrollment of its part-time tribal employees working between 16 and 32 hours per week by prorating shares in proportion to the percentage of time that a tribal employee in a comparable full time position is regularly scheduled to work.

(d) Tribal employee and tribal employer contributions to premiums under this subpart will be aggregated by the tribal employer. The tribal employee and tribal employer contributions must be available for receipt by the paymaster on an agreed upon date. The paymaster will receive the premium contributions together with the fee described at paragraph (e) of this section and will deposit the payment into the Employees Health Benefits Fund described in 5 U.S.C 8909.

(e) A fee determined annually by OPM will be charged in addition to premium for each enrollment of a tribal employee. The fee may be used for other purposes as determined by OPM. The fee must be paid entirely by the tribal employer as part of the payment to purchase FEHB for

tribal employees, and must be available for collection by the paymaster, together with the aggregate tribal employee and tribal employer contributions, in time to be currently deposited into the Employees Health Benefits Fund described in 5 U.S.C. 8909.

§ 890.1414 Responsibilities of the tribal employer.

(a) The tribal employer pays premiums for tribal employees enrolled under this subpart pursuant to §§890.1403 and 890.1413.

(b) The tribal employer must determine the eligibility of individuals who attempt to enroll for coverage under this subpart and enroll those it finds eligible.

(c) The tribal employer must determine whether eligible tribal employees have eligible family member(s) and allow coverage under a self plus one or self and family enrollment as described in §890.302 for those it finds eligible.

(d) The tribal employer must establish or identify an independent dispute resolution panel for reconsideration of enrollment and eligibility decisions as described in §890.1415.

(e) The tribal employer has the following notification responsibilities. The tribal employer must:

(1) Notify OPM and tribal employees in writing of intent to revoke election to purchase FEHB at least 60 days before such revocation described at §890.1404(d);

(2) Promptly notify tribal employees and OPM if there is a change in the tribal employer's entitlement to purchase FEHB described at §890.1410(d);

(3) Promptly notify affected tribal employees of termination of enrollment due to non-payment, the 31-day temporary extension of coverage and its ending date described at §890.1410 (f)(2)-(3); and

(4) Promptly notify affected tribal employees of termination of enrollment due to non-payment described at §890.1410 (f)(4).

§ 890.1415 Reconsideration of enrollment and eligibility decisions and appeal rights.

(a) The tribal employer shall establish or identify an independent dispute resolution panel to adjudicate appeals of determinations made by a tribal employer denying an individual's status as a tribal employee eligible to enroll in FEHB or denying a change in the type of enrollment (i.e.: to or from self only coverage) under this subpart. Such panel shall be authorized to enforce enrollment and eligibility decisions. The tribal employer shall notify affected individuals of this panel and its functions.

(b) Under procedures set forth by the tribal employer, an individual may file a written request to the independent dispute resolution panel to reconsider an initial decision of the tribal employer under this subpart. A reconsideration decision made by the panel must be issued to the individual in writing and must fully state the findings and reasons for the findings. The panel may consider information from the tribal employer, the individual, or another source. The panel must retain a file of its documentation until December 31 of the 3rd year after the year in which the decision was made, and must provide the file to OPM upon request.

(c) If the panel determines that the individual is ineligible to enroll in FEHB as a tribal employee or to change enrollment, the individual may request that OPM reconsider the denial. Such a request must be made in writing and any decision by OPM will be binding on the tribal employer.

(d) OPM may request a panel decision file during the retention period described at paragraph (b) of this section. Panel decisions remain subject to final OPM authority to correct errors, as set forth in §890.1406.

§ 890.1416 Filing claims for payment or service and court review.

(a) Tribal employees may file claims for payment or service as described at §890.105.

(b) Tribal employees may invoke the provisions for court review described at §890.107(b)-(d).

§ 890.1417 No continuation of FEHB enrollment into retirement from employment with a tribal employer.

(a) An FEHB enrollment cannot be continued into retirement from employment with a tribal employer.

(b) A Federal annuitant may continue FEHB enrollment into retirement from Federal service if the requirements of 5 USC 8905(b) for carrying FEHB coverage into retirement are satisfied through enrollment, or coverage as a family member, either through a Federal employing office or a tribal employer, or any combination thereof.

(c) A Federal annuitant who is employed after retirement by a tribal employer in an FEHB eligible position may participate in FEHB through the tribal employer. In such a case, the Federal annuitant's retirement system will transfer the FEHB enrollment to the tribal employer, in a similar manner as for a Federal annuitant who is employed by a Federal agency after retirement.

(d) A tribal employee who becomes a survivor annuitant as described in 890.303(d)(2) is entitled to reinstatement of health benefits coverage as a Federal employee would under the same circumstances.

§ 890.1418 No continuation of FEHB enrollment in compensation status past 365 days.

A tribal employee who is not also a Federal employee who becomes eligible for one of the Department of Labor's disability compensation programs may not continue FEHB coverage in leave without pay status past 365 days.

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